United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1273

To be argued by
M. HATCHER NORRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1273

UNITED STATES OF AMERICA,

Appellee,

—v.—

JON GREGORY MARKS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

On December 12, 1975 a Federal Grand Jury sitting in Hartford, Connecticut, returned a ten-count indictment charging Jon Gregory Marks with violations of Title 26, United States Code, Section 5861(d), Title 26, United States Code, Section 5861(e), Title 26, United States Code, Section 5861(f) and Title 18, United States Code, Section 922(a)(1).

On May 25, 1975 trial by jury commenced before Honorable Thomas F. Murphy. Marks testified and admitted all the acts alleged in the ten-count indictment, but raised the defenses of coercion and entrapment. On May 27, 1975 the jury returned verdicts of guilty on all ten counts. On the same date, Judge Murphy sentenced Marks to concurrent terms of six years on the nine viola-

tions under Title 26, United States Code and a concurrent five year sentence on the violation under Title 18, United States Code.[1]

Statement of Facts

The Trial

At trial Richard Weronik and Henry Moniz, special agents with the Bureau of Alcohol, Tobacco and Firearms of the U. S. Treasury Department, testified that they purchased firearms from Marks from July 14, 1975 to October 10, 1975. These firearms included four sawed-off shotguns (Exh. 5, 6, 9, 10), two handguns (Exh. 1, 2), a police shotgun (Exh. 4) and a .45 caliber semi-automatic rifle (Exh. 11). Two private citizens, Arthur Howe and Theodore Ames, testified that on or about September 9, 1975 Marks offered to sell them sawed-off shotguns in the V.I.P. Lounge in Hartford, Connecticut. (Tr. 106-109, Tr. 116-120).*

Marks testified and admitted each and every allegation in the indictment. His defense was based on claims of entrapment and coercion. On the coercion claim, Marks testified that a business associate, Richard Duggan, had threatened him with physical harm if he, Marks, did not repay a debt. Marks testified that Duggan suggested that he liquidate some personal property in order to raise the necessary funds. (Tr. 135-136). Marks also testified that in late May or early June of 1975, he gave two handguns (Exh. 1, 2) to Duggan for Duggan to sell. Duggan allegedly returned these weapons to Marks and

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[1] Marks had previously pleaded guilty to one count of the indictment and then withdrew his plea. However, a pre-sentence report had been prepared and was available to Judge Murphy on the date of Mark's conviction.

* References to the trial transcript will be "Tr. ——".

then introduced Marks to an undercover agent of the Bureau of Alcohol Tobacco and Firearms.

Thomas Conway, a defense witnesses, testified that Marks told him of threats from Richard Duggan. Conway did admit that his knowledge of these threats was only hearsay from Marks (Tr. 299). Conway also corroborated the testimony of Marks that Marks had Government's Exhibit Number 1 in his possession a number of months prior to July 14, 1975 (Tr. 293).

On rebuttal, Robert McCue, Inspector of Police for the West Hartford Police Department, produced certified records from the West Hartford, Connecticut Police Department (Exh. 14) that one handgun in evidence (Exh. 1) was in the continuous possession of the West Hartford Police Department from March 15, 1974 to June 9, 1975 and that the other handgun in evidence (Exh. 2) was in the continuous possession of the West Hartford Police Department from July 24, 1973 to July 9, 1975.

Following summations by both sides, Judge Murphy charged the jury with respect to the defense of entrapment and coercion. After some deliberation, the jury sent out a note which read, "We would like to have the law as to entrapment and coersion [sic] again." (Tr. 380). The Court summoned in the jury and repeated its original instructions on entrapment and coercion (Tr. 380-383). The jury deliberated the remainder of the day without reaching a verdict.

On May 27, 1976, the jury continued its deliberations and submitted a note which contained a number of requests (Tr. 386-387). One of those questions, which is at issue in the instant appeal, asked: "Does the term coercion *apply only* to Government by force or can it apply as threats or force by others than the Government?"

(Tr. 387). Judge Murphy asked counsel for their opinions and the prosecutor suggested rereading the instruc-on coercion. (Tr. 388). Defense counsel suggested that the Court reread the coercion instruction with an explanation that law also applies to coercion by private individuals (Tr. 389). Judge Murphy suggested that he write a note to the jury to inquire whether the requests were those of one juror or of the jury as a whole. Defense counsel did not object to this procedure (Tr. 391). When the jury indicated that its requests were those of the jury as a whole, Judge Murphy advised them of the time necessary to reread the testimony that they had requested (Tr. 393). Judge Murphy then asked the jury to return to the jury room and rephrase its requests (Tr. 393). The Court indicated that upon such action, it would comply with the jury's requests within reasonable time limitations. Defense counsel once again did not object to this procedure. After further deliberations the foreman of the jury sent out a note which informed the Court "Please disregard the previous three requests. *We* hopefully resolved them." (Tr. 397). At no time did defense counsel raise an objection to the procedure followed by the Court. The jury continued to deliberate and thirty-five minutes later reached a verdict of guilty on all counts.

Question Presented

1. Did the Court abuse its discretion by requesting the jury to rephrase and resubmit its requests rather than directly answering one jury request which concerned the application of the defense of coercion?

ARGUMENT

The Court did not abuse its discretion by inviting the jury to resubmit its questions after further consideration of exactly what information was necessary in their deliberations.

The defendant's "statement of the issue" creates the impression that the court refused to answer a question submitted by the jury during its deliberations. The chief issue is not whether the court erred in refusing to answer the jury's question; rather the issue is whether the court abused its discretion in requesting that the jury reconsider its requests and then inform the court of what information they desired.

It is well established that a request for additional instructions or a request that certain instructions be reread are matters addressed to the sound discretion of the trial judge. *United States* v. *Jarboe*, 374 F. Supp. 310, 317 (W.D.Mo. 1974), *aff'd*, 513 F.2d 33 (8th Cir. 1975), *cert. denied* 423 U.S. 849 (1975); *United States* v. *Gordon*, 455 F.2d 398, 402 (8th Cir. 1972); *Whitlock* v. *United States*, 429 F.2d 942, 946-947 (10th Cir. 1970). It is also important to note in light of the particular facts of the instant case, that once the trial judge has made an accurate and correct charge, the extent of its amplification rests largely in his discretion. *United States* v. *Bayer*, 331 U.S. 532, 536 (1947); *United States* v. *Center Veal & Beef Co.*, 162 F.2d 766, 772 (2d Cir. 1947).

In the case at bar the court instructed the jury, as requested by defense counsel, on the law of coercion. The defendant does not challenge this instruction. Indeed the coercion instruction was repeated at the jury's request.[2]

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[2] Tr. 383.

On May 27, 1976, the second day of deliberation, the jury sent Judge Murphy a note requesting various portions of testimony that they wished read back to them and a question concerning the applicability of the defense of coercion.[3] Judge Murphy requested suggestions from counsel regarding the procedure to be followed in answering the jury's requests. Judge Murphy told counsel that he intended to first inquire of the jury whether the questions and requests were those of the jury as distinguished from an individual juror. When the court asked if there were any objections to this procedure defense counsel did not note an objection.[4]

Once the jury responded to the Judge's question, they were called back into court. Judge Murphy advised the jury of the time required to reread the requested testimony and then requested that the jury rephrase and resumit their questions.

> So in view of what I have told you, would you go back to the jury room and see whether you can rephrase what you want and I will be happy to do it, if we can, with some kind of reasonable time involved. Now, it might be that this is exactly what you want, and if that is so, then you tell me so and I will decide whether I am going to give it to you or not.
>
> So would you, please, go back and try to do that for me?[5]

The record fails to disclose any refusal by the court to comply with the requests of the jury. It is also noteworthy that following the Judge's request for resubmission of the questions to the jury, there was no objection from defense counsel.

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[3] Tr. 386-387.
[4] Tr. 391.
[5] Tr. 393-394.

In response to Judge Murphy's request, he received a note from the jury foreman which read: "Please disregard the previous three requests. *We* hopefully resolved them."[6] Shortly following this note the jury informed the court that it had reached a verdict. A polling of the jury revealed that each juror announced the verdict of guilty as his own.

In *Wilson* v. *United States*, 422 F.2d 1303 (9th Cir. 1970), the Ninth Circuit, on similar facts, found that there was no abuse of the trial judge's discretion in requesting the jury to resubmit its question after further deliberation. In *Wilson*, the Court had reread two portions of its initial charge to the jury when it received a request to repeat its instruction "about intent, ignorance".[7] As in the case at bar, the court requested that the jury give more consideration to its requests and then resubmit the requests it deems necessary.[8]

In finding that the trial court acted witnin its discretion, the *Wilson* Court distinguished two cases relied upon in Mark's brief.

> Unlike the cases cited by appellant, the court here neither gave an inadequate answer nor refused to answer the juror's question. Rather, the court invited the jury to resubmit the question if necessary after further deliberation (footnote omitted) *Wilson* v. *United States*, *supra*, at 1304.

In distinguishing *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1946) and *Wright* v. *United States*, 250

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[6] Tr. 397.

[7] 422 F.2d 1303, 1304 (9th Cir. 1970).

[8] The Court instructed the jury as follows: "Well why don't you consider further on the matter and then if there is something more, as I say, if necessary I will re-read them all to you . . .", *Id.* at 1304.

F.2d 4, 11 (D.C.Cir. 1957), the *Wilson* Court refused to equate the request for reconsideration of questions with the refusal to answer questions. In the instant case, as in *Wilson*, *supra*, no additional questions were received from the jury after the suggestion that the jury reconsider its requests. The trial transcript is clear that counsel for Marks failed to raise any objection following the court's request for resubmission to the jury. The procedure here was well within the court's discretion.

The situation in the instant case is not like that in *United States* v. *Bolden*, 514 F.2d 1301 (D.C.Cir. 1975). In *Bolden* the Court did not ask the jury to rephrase its requests, but rather failed to respond to the jury's inquiry. In reversing the conviction in *Bolden*, the Court noted that the trial judge's failure to answer the jury's question could have left the jury with an incorrect impression regarding the state of the law. *United States* v. *Bolden*, *supra*, at 1308. In the instant case, unlike *Bolden*, there were no unanswered questions from the jury at the time of the verdict. The jury was provided the opportunity to rephrase and resubmit questions and indicated to the court with their verdict that their questions had been resolved.

Defendant argues that the jury might well have reached a different verdict if instructed on their additional question regarding coercion.[9] This argument for verdict speculation was dismissed in both *Jordon* v. *Bondy*, 114 F.2d 599 (D.C.Cir. 1940) and *United States* v. *Lanni*, 335 F.Supp. 1060 (E.D.Pa. 1971), *aff'd*, 466 F.2d 1102 (3rd Cir. 1972).

In *Jordon* v. *Bondy*, *supra*, a juror made a request for additional instructions late in the afternoon of the first day of deliberations. Although the request was communi-

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[9] Appellant's brief at 4.

cated from the foreman to the deputy marshal, the jury continued deliberations without sending for the judge who had since gone home. On the following day of deliberations, the jury did not repeat the request for further instructions. The jury returned a verdict of guilty and each juror polled affirmed the jury's verdict as his own. In ruling on the jury's failure to resubmit the question to the trial judge, the court found that the juror or jurors could waive a request for further instructions:

> The only reasonable conclusion is that if Goode [the juror] at one time during the jury's consideration of the case desired additional instructions concerning its disposition, he did not desire them sufficiently at that time to demand that the judge be sent for and by the time the judge was readily available during later deliberations by the jury, he had resolved his doubts and no longer wished to have further instructions. *Jordon* v. *Bondy*, *supra*. at 605; *see also United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir. 1973), *cert. denied* 412 U.S. 941 (1973).

Here, the only reasonable conclusion to be drawn from the jury's failure to rephrase and resubmit their questions is that they resolved their doubts by means of their own discussions and deliberations. Indeed they so indicated by their subsequent note (Tr. 397).

The polling of the jury refutes the defendant's argument. In the instant case, as in *United States* v. *Lanni*, *supra*, each juror was polled and assented to the verdict of guilty as to all counts.[10] The Court in *Lanni*, in rejecting the claim that the trial judge erred in accepting a verdict without answering the jury's question, refused to

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[10] Tr. 398-400.

speculate on what verdict would have been returned had the court answered the jury's question:

> . . . we can only conclude that the juror or jurors who sought additional instructions changed their mind about the need for instructions and were able to reach a guilty verdict through further deliberations. *United States* v. *Lanni*, *supra*, at 1084-1085.

The polling of the jury informs the defendant that each and every juror, after diligent consideration of the testimony and the evidence agrees on the verdict returned to the court. The answering of questions and the elimination of confusion is at the heart of the jury function.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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No. 76-1273

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JON GREGORY MARKS

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 31 day of August, 1976, deponent served the within Brief for the Appellee upon Office of the Public Defender Federal Building 450 Main Street , Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 31st day of August 1976

SHIRLEY AMANDO
Notary Public, State of New York
No. 24-4585799
Qualified in Kings County
Commission Expires March 30, 1977